Supreme Court, U.S.
FILED
SEP 22 1987
JOSEPH F. SPANIOL JR.
CLERK

87-483

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JAMES P. ATWOOD,

PETITIONER,

VS.

CHARLES SIPPLE, III, and JOEL GIBSON,

RESPONDENTS.

JURISDICTIONAL STATEMENT

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS
AND
THE SUPREME COURT OF GEORGIA

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I

QUESTIONS PRESENTED

This case involves a decision of the Court of Appeals of Georgia, that the Supreme Court of Georgia refused to review, which is contrary to Amendment V and Amendment XIV of the Constitution of the United States, in that petitioner was deprived of his property without due process of law.

The question presented is whether respondent's Motion to Disqualify plaintiffs' counsel at the trial court should have been granted.

II

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Appendix B, Denial of Motion for Rehearing in the Court of Appeals of Georgia, dated on May 8, 1987.

Appendix C, Denial of Application for the Writ of Certiorari, dated June 4, 1987.

Appendix D, Denial of Motion for Rehearing on Writ of Certiorari dated June 24, 1987.

Appendix E, Amendment V of the Constitution of the United States.

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III

OPINION BELOW

Decision of the Court of Appeals of Georgia dated April 22, 1987 (Appendix A, infra); Motion for Rehearing in the Court of Appeals of Georgia, denied on May 8, 1987 (Appendix B); Application for the Writ of Certiorari, denied by the Supreme Court of Georgia on June 4, 1987 (Appendix C); and, Motion for Rehearing on this Writ, denied on June 24, 1987 (Appendix D).

IV

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(a) Nature of the Proceedings.

This is an Application for the Writ of Certiorari to the Court of Appeals of Georgia that denied a right specifically set out and claimed under Amendment V and

and Amendment XIV of the Consitution of the United States depriving appellant James P. Atwood of his property rights without due process of law contrary to such rights as a result of the trial court refusing to disqualify opposing counsel.

(b) Judgment sought to be reviewed.

The trial court, the Superior Court of Chatham County, Georgia, entered an Order on July 22, 1986 denying defendant James P. Atwood's Renewed Motion to Disqualify Plaintiff's Counsel which was appealed to the Court of Appeals of Georgia. The Court of Appeals in a decision rendered on April 22, 1987 upheld this Order of the trial court.

The Court of Appeals of Georgia held that the trial court's denial of the appellant's Motion to Disqualify Counsel for the Plaintiffs was not in error as the situation in this case involved joint

venturers who all met with counsel at the same time for the purpose of discussing their venture and that attorney-client privilege does not apply between joint venturers.

(c) Jurisdiction.

The jurisdiction of the Supreme Court of the United States is conferred by Title 28 USC Section 1257(3) relating to the rights afforded to the appellant under Artile I, Section I, Paragraph I and II and also by Amendments XIV and V of the Constitution of the United States; in that the trial court allowed the plaintiffs' law firm to represent plaintiff in an action against the defendant when all parties were joint venturers to an agreement which was the bases of a subsequent action against the appellant, all in a manner that constitutes a denial of equal protection of laws and property rights of the

appellant without the due process as protected by these aforesaid Amendments to the Constitution of the United States.

V.

AMENDMENTS INVOLVED

The Amendments involved are Amendment V and XIV of the Constitution of the United States, set forth in Appendix D to this Jurisdictional Statement.

VI.

STATEMENT OF THE CASE

On June 26, 1979, a conference was held between the appellees Charles Sipple and Joel Gibson and the appellant James P. Atwood in the law offices of Alan S. Gaynor, a partner in the law firm of Bouhan, Williams and Levy in Savannah, Georgia, to discuss the business relationship between the appellees and the appellant James P. Atwood, as well as with other defendants below, Roberto

Baessa, Altas Normas and Union, whereupon on the day following this meeting, on June 27, 1979 a draft and redraft of the agreement reached by these parties was prepared by Alan S. Gaynor, which was followed by another conference on October 3, 1979 at this law firm between Charles Sipple, Joel Gibson and the appellant Atwood to review these documents with Mr. Gaynor and to sign the documents between the parties.

The business relationship involved the purchase and resale of 119 saltwater damaged British Leland automobiles to be purchased from British Leland and then resold to Guatamala for resale.

The joint venture agreement was terminated by Sipple and Gibson in March 1980, followed by Sipple and Gibson filing a Complaint in April 1980 through this same law firm naming one individual, Roberto Baessa, and a Guatamalian

company, Altas Normas and Union. A Default Judgment was entered against the Guatamalian individual and company in September 1981.

On April 16, 1980, some eighteen months after Sipple and Gibson had filed their initial lawsuit, the appellees, through their attorney, Walter C. Hartridge, III of this same law firm which represented Sipple and Gibson and appellant Atwood at the initial stage of the joint venture agreement, then added Atwood as defendant to this suit, by Amendment to the Complaint against these other defendants. This decision to add Atwood was made at a conference between Mr. Gaynor's then associate, Mr. Odum, as reflected by the billing sheet of the law firm of Bouhan, Williams and Levy.

The facts are undisputed that Alan S. Gaynor represented Sipple and Gibson as well as Atwood at the initial stage of

the formation of the joint venture agreement as well as at the finalization of the partnership and at the signing of this document. The plaintiff Sipple stated: "That all three of us", meaning Atwood, Sipple and Gibson, selected Mr. Gaynor of the law firm of Bouhan, Williams and Levy to represent them in drawing up the joint venture agreement. The selection of Mr. Gaynor by Sipple, Gibson and Atwood was also confirmed by Mr. Gibson who stated that: "It was agreeable to everybody, to select Mr. Gaynor to represent them in drawing up the venture and stated that: "We" picked Mr. Gaynor.

Further, Sipple stated that: "Mr. Atwood and Mr. Gibson instructed me to contact an attorney and to make an appointment for us to discuss having a contract of some type drawn up...". After Mr. Sipple made the appointment

"for all three of us to meet with Mr. Gaynor", which was done, Mr. Sipple stated that Mr. Gaynor suggested a joint venture which he drew up for all three. Atwood further stated that he had no objection to Mr. Gaynor representing "us in this matter" concerning the joint ventures since he knew Mr. Hartridge of the same law firm and knew their reputation. The chronology of events in obtaining Mr. Gaynor to represent the plaintiffs below, Sipple and Gibson, and defendant below, Atwood, clearly establishes that the law firm of Bouhan, Williams and Levy represented Mr. Atwood during the inception of the joint venture which was the subject matter of the subsequent litigation.

Atwood's Motion to Disqualify Counsel for the plaintiffs made in the trial court was based on the fact that during the formation state of the joint

venture, from which the subsequent litigation arose, a partner for the law firm that represented the plaintiffs in this action against him, had consulted with the plaintiffs and Atwood in any attorney-client relationship at which time the firms' attorney obtained privileged and confidential information from Atwood concerning his private business affairs, as well as private business affairs of Roberto Baessa, thus creating an irrevocable conflict of interest preventing any member of this law firm from representing these plaintiffs against the defendant Atwood in any subsequent litigation concerning the joint venture.

All the questions sought to be reviewed here were raised first in the trial court, the Superior Court of Chatham County as confirmed in the Renewed Motion to Disqualify Counsel and

next in the Court of Appeals of Georgia in the Enumeration of Errors, and finally in the Supreme of Georgia in the Application for the Writ of Certiorari from the Supreme Court to the Court of Appeals of Georgia as set out in questions presented to the Supreme Court of Georgia.

VI.

STATEMENT OF REASONS WHY

THE WRIT OF CERTIORARI SHOULD BE GRANTED

The question presented on this Application for the Writ of Certiorari relates to appellant's denial of equal protection of the laws and of his property rights without due process is protected by the Constitution of the United States, Amendments XIV, which V shows that this case is of imperative public importance concerning an irrevocable conflict of interest between the defendant and the attorneys for the

plaintiff in the trial court as to justify the deviation from the normal appellate process so as to require immediate settlement in this Court. Further, Certiorari should be granted in this case as it involves great Constitutional significance and has extraordinary national importance in the area of attorney-client privileges. There also exists a strong public interest and a speedy determination of this issue.

The law firm of Bouhan, Williams and Levy should have been disqualified from representing the plaintiffs below in this action since their law firm drafted the document from which this suit has arisen against the defendant Atwood. In Healthcrest, Inc. v. American Medical Intern, Inc., 605 F. Supp. 507 (N.D. Ga. 1985), the Federal Court for the Northern District of Georgia held that a law firm

should be disqualified in a breach of contract action (which is the cause of action in the instant case) between the parties where the law firm had drafted the instrument that triggered the litigation. Since the law firm of Bouhan, Williams and Levy drafted the document that "triggered" this litigation, consulted with the plaintiffs and this defendant below, Atwood, in the preparation of documents, with this law firm obtaining confidential and privileged information from defendant Atwood, the law firm of Bouhan, Williams and Levy should have been disqualified from representing the plaintiffs in this case; thus this whole proceeding should be reversed and set aside as the defendant has been prejudiced and irrevocably damaged as his rights to equal protection of laws and his property rights have been denied and violated

without due process of law of which he has been deprived.

As to the issue of whether Mr. Gaynor of the law firm of Bouhan, Williams and Levy was employed by the defendant Atwood in the drafting of joint venture agreement, the Supreme Court of Georgia held In Matter of Dowdy, 247 Ga. 48, 491 that: "Generally, the relationship of an attorney and client is a matter of contract but the contract may be expressed or implied from the conduct of the parties. The employment is sufficiently established when it is shown that the advice or assistance of an attorney is sought and received in matter pertinent to his profession.

Here, Mr. Gaynor, of the law firm of Bouhan, Williams and Levy discussed and advised regarding the intricacies of a joint venture partnership in the presence of and with both the plaintiffs and the

defendant Atwood, thereby establishing the attorney-client relationship between his law firm and Atwood.

Since Mr. Alan S. Gaynor of the law firm of Bouhan, Williams and Levy had drafted the document, which has triggered this subsequent litigation between the parties, he disqualified both himself and all members of his law firm from representing the plaintiffs below against Atwood in later litigation concerning the instrument which Mr. Gaynor drafted. Mr. Hartridge, of the same law firm, Bouhan, Williams and Levy, specifically is equally disqualified, under American Bar Association Formal Opinion Number 53 which states: a lawyer shall not represent a client whose interest is adverse to the interest of a former client of the lawyer in any manner substantually related to the matter in which the lawyer represented the client,

unless he has obtained written consent of the former client after full disclosure.

At no time did a partner of the law firm of Bouhan, Williams and Levy obtain written consent from the defendant below, Atwood, nor at any time disclose any potential differing interest between the plaintiffs and defendant below at a conference where the joint venture agreement was consummated and finalized as required by Standard 69 in the Rules and Regulations for the organization and the government of the State Bar of Georgia.

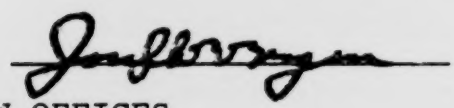
Since an attorney for the law firm which represents the plaintiffs below in this action and consulted with the defendant below, Atwood, in an attorney-client relationship in the preparation and drafting and the finalization of a document that triggered the subsequent law suit, this law firm of

Bouhan, Williams and Levy and its members must be disqualified from representing the plaintiffs in this case, as an irrevocable conflict of interest exists between this law firm and Atwood. To allow such representation would be a clear denial of equal protection of laws and of a property right without due process to Atwood, as protected by the Amendments V and XIV of the Constitution of the United States.

Consequently, it is urgently suggested that the Supreme Court grant the Writ of Certiorari in this case.

Dated: September 21, 1987.

JOSEPH B. BERGEN
Attorney for Appellant



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APPENDIX "A"

April 22, 1987

In the Court of Appeals of Georgia

73736. ATWOOD v. SIPPLE et al. (Bea-17)

BEASLEY, Judge.

Plaintiffs Sipple and Gibson sued Atwood and others for breach of contract, fraud, and conversion arising out of a joint venture agreement which basically provided that 119 saltwater damaged British Leyland automobiles were to be purchased from British Leyland and then shipped to Guatemala for sale. Because of the damage, the cars could not be sold in the United States. Atwood, a retired Army officer, was at that time living in Guatemala and claimed to be involved in the import/export business there. Although a substantial shipment was sent to Guatemala, for a myriad of reasons, the business was unsuccessful and the joint venture was terminated by

plaintiffs in March 1980.

The complaint was filed in April 1980, naming only two Guatemalan companies and one individual, all of whom were involved in the Guatemalan end of the enterprise. In September 1981 after a default judgment was entered against the Guatemalan individual, the complaint was amended to add Atwood as a defendant. Two years later, plaintiffs and defendant Atwood consented to an order referring the matter to an auditor pursuant to Chapter 7 of Title 9, OCGA. The auditor heard the matter in June 1984, and plaintiffs filed their 12-page "Proposed Findings of Fact and Conclusions of Law" on August 30. Defendant Atwood served but did not file his "Response to Plaintiffs' Proposed Findings" on plaintiffs' counsel on October 27. Defendant did not submit any proposed findings of fact and conclusions of law.

The auditor's 31-page report, finding for plaintiffs, was filed on September 23, 1985. Three days later, defendant filed the "Response to Plaintiffs' Proposed Findings" with the court.

After two months passed, defendant filed a "Motion to Withdraw Transcript for Duplication and to Allow Extension of Time to File Amendment to Exceptions with Memorandum." In this document, defendant contended that his Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law"...contained the substance of the exceptions this plaintiff has to the Report of the Auditor...;" it was also indicated, in requesting the time extension, that defendant could not afford to purchase a copy of the transcript before the auditor's report was filed, and that thereafter "...counsel for this defendant became incapacitated by reason of a

medical diagnosis that required ...tests in hospitals...that continued through the week of November 18, 1985..." Defendant's motion was denied on April 8, 1986.

Judgment was entered by the court for plaintiffs on June 17, 1986, the court holding that no timely exceptions had been filed by defendant to the auditor's report. From this judgment, defendant appeals.

1. Defendant contends, based on OCGA Section 9-7-14(c), that the trial court erred in not treating his Response to Plaintiffs' Proposed Findings of Facts and Conclusions of Law as the exceptions to the auditor's report. A review of the statutory scheme concerning auditor's reports, their use and purpose, however dispels this argument.

Chapter 7 of Title 9, OCGA covers auditor's reports and the procedures

involved in using an auditor. The parties agreed to submit the factual investigation to an auditor, and a lengthy hearing was conducted. The code then requires that "...the auditor shall file the evidence and a report in which he shall clearly and separately state all rulings made by him, classify and state his findings, and report his conclusions upon the law and facts." OCGA Section 9-7-8. A party having objection of law or fact to the report of the auditor must file his exceptions to the report within "20 days after the report is filed and notice is given to the parties..." OCGA Section 9-7-14(a). While a trial judge may grant an extension of time for the filing of exceptions, any such application for an extension must be made before the initial 20 days expire. OCGA Section 9-7-14(b); Collins v. Lyon, Lyon & Company, Inc., 222 Ga. 6(1)(148 SE 2d

428)(1966).

While defendant is correct that grounds for exceptions are no longer required to be complete in themselve, OCGA Section 9-7-14(c), he errs in his assertion that the liberal notice pleading concept of the Civil Practice Act overrides the specific requirements of the auditor's statute. See Beck v. Cobb County, 180 Ga. App. 808, 812 (350 SE2d 818)(1986); Wise &c.Assoc. v. Rosser White &c. Inc., 146 Ga. App. 789, 794 (5c)(247 SE2d 479) (1978). Subsection (c), while not requiring the grounds for objection to be complete in themselves, goes on: "It shall be sufficient for purposes of this Code section, if the exceptions point out by title and paragraph number such part of the pleadings, and by page number such part of the auditor's report, and such parts of the evidence reported by the auditor

as are necessary to an understanding of the errors complainted of." The reason for requiring such specificity in the factual exceptions is stated in OCGA Section 9-7-17: "In all law cases where an auditor is appointed, exceptions of fact to his report shall be passed upon by the jury as in other issues of fact, ..." The case is submitted to the jury on the testimony reported by the auditor, OCGA Section 9-7-18, and the jury is required to find "...for or against each exception submitted seriatim." OCGA Section 9-7-20.

The filing of a document which defendant "treated" as his exceptions is not sufficient for these purposes. Beck v. Cobb County, supra at 811, involved proceedings under the special statutory proceeding for condmnation, which is similar to the auditor statute. There, the condemnees raised issues concerning

the county's power to take the property, but "...subsequent to the entry of the award of the special master and prior to the entry of the judgment of the trial court vesting title in the county pursuant to the special master's award, the only action taken by appellants was the filing of what can only be denominated a notice of appeal to a jury.... At no time did appellants file specific exceptions to the award of the special master in order to preserve their right to have the superior court pass upon their claims..."

The Response filed by defendant likewise does not fulfill the purpose of the exceptions required by Chapter 7, and the trial court's failure to treat them as such was not error. It likewise follows that the court's denial of defendant's motion to amend this document was not error, because it did not perform

the office of the requisite exceptions in the first place. It also follows that the denial of the motion to reconsider was not error, the initial determination having been correct. There being no exceptions filed, the court did not err in entering judgment on the auditor's report in plaintiff's favor. OCGA Section 9-7-21(a).

2. Enumerations of Error 5-19 are all matters which should have been excepted to and, as discussed above, were not. Therefore, they were waived and will not now be considered. See Foster v. Pennsylvania Millers Mut. Ins. Co., 143 Ga. App. 792 (240 SE2d 144) (1977).

3. After defendant was added to the suit in 1981, a change in counsel occurred and his present counsel entered the suit by appearance on March 29, 1983. No motion or other pleading was filed concerning the disqualification of

plaintiffs' law firm prior to the hearing conducted by the auditor during June 1984.

About halfway through the hearing, defendant's counsel alluded to a perceived conflict in the context of objecting to the recovery of fees by plaintiffs' counsel since counsel had allegedly represented both plaintiffs and defendant in the drafting of the joint venture agreement at issue. The auditor ruled that such a matter had not been included in the order referring the dispute to him and advised defendant to file any such motion with the court. When the motion was filed in June 1986, it was based on the ground that the firm of plaintiffs' counsel had drafted the joint venture agreement (a lawyer other than trial counsel) and had obtained "privileged and confidential information" concerning the Guatemalan individual and

defendant. Although there was conflict in the evidence as to whether the firm represented all three joint venturers or only the plaintiffs, it was not disputed that during all meetings with the attorney doing the drafting, all three joint venturers were present.

Even if the law firm represented all three joint ventures as argued by defendant, the trial court's denial of the motion was not error. In a situation where joint venturers all meet with counsel at the same time for purposes of discussing their venture, the privilege does not apply as between the venturers. Walker v. Mason, 75 Ga. App. 229, 231(1) (43) SE2d 116)(1947)' Agnor's Ga. Evid., Section 6-3; see Gearhart v. Etheridge, 232 Ga. 638, 640 (208 SE 2d 460)(1974). Healthcrest, Inc. v. American Medical International, 605 FSupp 1507 (N.D. Ga. 1985), cited by defendant, does not

dictate a different result. Aside from the fact that the case arose in a court whose rulings do not bind this Court, the ruling of the court was based on the specific finding that one of the drafting attorneys was a necessary witness for the client, a ground not raised in the present case.

Judgment affirmed. McMurray, P.J. and Sognier, J., concur.

APPENDIX "B"

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, May 8, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

73736, James P. Atwood v. Charles Sipple, III, et al.

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta May 8, 1987.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

VICTORIA McLAUGHLIN,
Clerk

APPENDIX "C"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
Atlanta JUN 4, 1987

Case No. 44712, Atwood v. Sipple, et al.

The Supreme Court denied the writ of certiorari in this case.
All the justices concur.

Very truly yours,
JOLINE B. WILLIAMS,
Clerk

APPENDIX "D"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
Atlanta JUN 24, 1987

The Motion for a rehearing was denied today:

Case No. 44712, Atwood v. Sipple III, et al.

Very truly yours,
JOLINE B. WILLIAMS,
Clerk

APPENDIX "E"

AMENDMENT V
TO THE CONSTITUTION OF THE UNITED STATES
[Rights of Accused
in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "F"

AMENDMENT XIV
TO THE CONSTITUTION OF THE UNITED STATES

[Citizenship Rights
Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor dny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "G"

AMERICAN BAR ASSOCIATION

FORMAL OPINION NUMBER 53

A lawyer shall not represent a client whose interest is adverse to the interest of a former client of the lawyer in any manner substantually related to the matter in which the lawyer represented the client unless he has obtained written consent of the former client after full disclosure.

APPENDIX "H"

STANDARD 69
RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GEORGIA

A lawyer shall not represent a client whose interests are adverse to the interests of a former client of the lawyer in any matter substantially related to the matter in which the lawyer represented the former client unless he has obtained written consent of the former client after full disclosure. A violation of this standard may be punished by disbarment.

APPENDIX "I"
IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

CASE NO. 73736

JAMES P. ATWOOD,

Appellant,

v.

CHARLES SIPPLE, III,
et al.

Appellees.

NOTICE OF INTENTION
TO APPLY FOR CERTIORARI

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NOTICE OF INTENTION TO APPLY FOR CERTIORARI

NOW COMES the appellant in the foregoing styled action, JAMES P. ATWOOD, and files this Notice with the Clerk of the Court of Appeals within twenty (20) days of the Order denying his Motion for Rehearing of his Application for the Writ of Certiorari filed in the Supreme Court of Georgia to review the Decision of this Court entered on April 22, 1987 affirming the Judgment of the Superior Court of Chatham County in favor of the appellees entered on June 24, 1987 by the Supreme Court of Georgia of his intention to apply for either the Writ of Certiorari or to Appeal the Decision of this Court to the Supreme Court of the United States, given pursuant to Rule 16(B) of the Court of Appeals of the State of Georgia and that his Petition for

Certiorari or Appeal will be filed within the time prescribed under the Rules by the Supreme Court of the United States.

Date: July 3, 1987.

Respectfully submitted,
JOSEPH B. BERGEN
AND
FREDERICK S. BERGEN
Attorneys for Appellant
(Petitioner)

/s/ Joseph B. Bergen

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
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Telephone: (912) 233-6600

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing pleading was on this date served on the following in captioned cause by placing same in an authorized depository for mail in a properly addressed envelope with sufficient postage thereon to insure first class delivery to:

Ms. Victoria McLaughlin
Clerk, Court of Appeals
of Georgia
433 State Judicial Building
Atlanta, Georgia 30334

Walter C. Hartridge, Esq.
Bouhan, Williams and Levy
Attorneys at Law
Post Office Box 2139
Savannah, Georgia 31498
Telephone: (912) 236-2491

This 3rd day of July, 1987.

JOSEPH B. BERGEN
AND
FREDERICK S. BERGEN
Attorneys for
Appellant

/s/ Joseph B. Bergen

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Savannah, Georgia 31401
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APPENDIX "J"

PROOF OF SERVICE

I, the undersigned JOSEPH B. BERGEN, attorney of record for the appellant in the foregoing case and a member of the Bar of the Supreme Court of the United States depose and say that on the 3rd day of July, 1987 I served three copies of the foregoing Notice of Intention to Apply for Certiorari Court of Appeals of Georgia on WALTER C. HARTRIDGE,III, ESQ., attorney of record for the appellees herein whose post office address is: Post Office Box 2139, Savannah, Georgia 31498, and also on the HONORABLE VICTORIA McLAUGHLIN, Clerk of the Court of Appeals of Georgia whose post office address is: 433 State Judicial Building, Atlanta, Georgia 30334, who are all the parties required to be served with this notice, by placing a copy of said Notice of Intention to

Apply for Certiorari in an authorized depository for mail at a United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure first class delivery to the said WALTER C. HARTRIDGE, III, ESQ. and certified mail delivery to the HONORABLE VICTORIA McLAUGHLIN, within the time allowed for filing.

This 21st day of September, 1987.

JOSEPH B. BERGEN
Attorney at Law
Appearing for
Appellant

Sworn to and Subscribe to before me
This 21st day of September, 1987.

FREDERICK S. BERGEN
Notary Public, Georgia

APPENDIX "K"

ENTRY OF APPEARANCE

SUPREME COURT OF THE UNITED STATES

NO._____

JAMES P. ATWOOD,

Appellant,

VS.

CHARLES SIPPLE, III, et al.,

Appellees.

The Clerk will please enter my appearance as counsel for the above appellant, JAMES P. ATWOOD.

I certify that I am a member of the Bar of the Supreme Court of the United States.

Dated: September 21, 1987.

JOSEPH B. BERGEN
Attorney at Law

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
Savannah, Georgia 31401
Telephone: (912) 233-6600

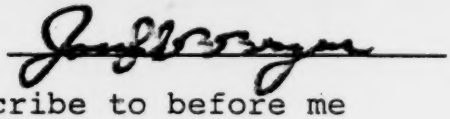
APPENDIX "L"

PROOF OF SERVICE

I, the undersigned JOSEPH B. BERGEN, attorney of record for the appellant in the foregoing case and a member of the Bar of the Supreme Court of the United States depose and say that on the 21st day of September, 1987 I served three copies of the foregoing Entry of Appearance to the Supreme Court of Georgia on WALTER C. HARTRIDGE,III, ESQ., attorney of record for the appellee herein whose post office address is: Post Office Box 2139, Savannah, Georgia 31498, the party required to be served with this entry, by placing a copy of said Entry of Appearance in an authorized depository for mail at a United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure first class within the time allowed for filing.

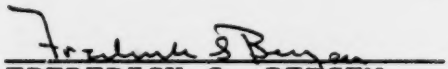
This 21st day of September 1987.

JOSEPH B. BERGEN
Attorney at Law
Appearing for Appellant



Sworn to and Subscribe to before me

This 21st day of September 1987.



FREDERICK S. BERGEN
Notary Public, Georgia

APPENDIX "M"

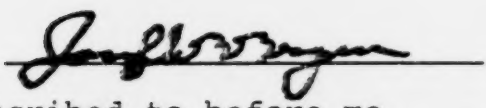
PROOF OF FILING AND SERVICE

I, the undersigned JOSEPH B. BERGEN, Attorney of Record for the Appellant, and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 21st day of September 1987, I filed 40 copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States with the Clerk of the Supreme Court of the United States and I served three copies of this Jurisdictional Statement to the Superme Court of the United States on Walter C. Hartridge, III, Esq. Attorney for Appellees, whose Post Office Address is: Post Office Box 2139, Savannah, Georgia 31498, who are all the parties required to be served, by causing to be placed these copies of said Jurisdictional Statement in an authorized depository for mail at the United States Post Office at Atlanta, Georgia in a properly addressed

envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for such filing.

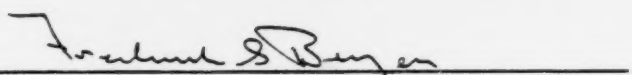
This 21st day of September 1987.

JOSEPH B. BERGEN
Attorney for Appellant



Sworn to and subscribed to before me

This 21st day of September 1987.



Frederick S. Bergen
Notary Public, Georgia

Supreme Court, U.S.
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No. 87-483

In The
Supreme Court of the United States
October Term, 1987

—o—

JAMES P. ATWOOD,

Petitioner,

vs.

CHARLES SIPPLE, III AND JOEL GIBSON,

Respondents.

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

—o—

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED FOR REVIEW

Respondents note that Petitioner James P. Atwood has not complied with the rules of this Court and has submitted a Jurisdictional Statement pursuant to Rule 15 of the Rules of this Court as opposed to a Petition for Certiorari pursuant to Rule 21 of the Rules of this Court despite the fact that it is obvious that Petitioner is seeking a writ of certiorari and has no grounds for a direct appeal. Nevertheless, it appears that the question raised by the Petitioner is whether Petitioner's Motion to Disqualify Respondents' counsel at the trial court should have been granted.

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IV.

CITATION TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Decision of the trial court dated July 22, 1986; Decision of the Court of Appeals of Georgia dated April 22, 1987; Motion for Rehearing in the Court of Appeals of Georgia, denied on May 8, 1987; Application for the Writ of Certiorari, denied by the Supreme Court of Georgia on June 4, 1987; and Motion for Rehearing on this Writ, denied on June 24, 1987. Copies of these opinions are attached hereto in the Appendix.

———o———

V.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

It is the Petitioner's position that this is an Application for the Writ of Certiorari to the Court of Appeals of Georgia that allegedly denied a right specifically set out in claim under Amendment V and Amendment XIV of the Constitution of the United States depriving Appellant James P. Atwood of his proper rights without due process of law contrary to such right as a result of the trial court refusing to disqualify opposing counsel. Respondents show that no substantial Federal or Constitutional question is raised by the Petitioner and contest the jurisdiction of this Court.

———o———

VI.

CONSTITUTIONAL PROVISIONS INVOLVED

It is Respondents' position that this case raises no substantial Constitutional question.

———o———

VII.

STATEMENT OF THE CASE

Respondents show that the Statement of the Case set forth by Petitioner is misleading and said statement is hereby expressly controverted.[1] In lieu of the facts set forth by the Petitioner, Respondents show the following facts:

This is an action for compensatory and punitive damages based upon breach of contract, conversion and fraud. By Consent Order dated August 24, 1983, the trial court, counsel for Petitioner and counsel for the Respondents, consented to the appointment of Michael J. Gannam as auditor to investigate all the factual matters in dispute in this action and to report the results to the trial court. Mr. Gannam submitted his report on September 20, 1985. No exceptions were taken to the auditor's report and, indeed, no response was filed whatsoever to the auditor's report by counsel for Petitioner Atwood until Petitioner Atwood

---

[1] In compliance with Rule 28.1 of the Rules of this Court, Respondents show that they are individuals and that the Petitioner is also an individual. Accordingly, the style of the case discloses all individuals with an interest in this action.

filed a Motion to Withdraw Transcript for Duplication and to Allow Extension of Time to File Amendment to Exceptions with Memorandum on November 27, 1985. Through his Motion, counsel for the Petitioner sought to submit his objections to the auditor's report well beyond 20 days after the report was filed and notice was given to the parties. Defendant Atwood's Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law was merely a critique of the Plaintiffs Proposed Findings of Fact and Conclusions of Law originally submitted to the auditor and subsequently filed. The trial court by means of an Order dated April 8, 1986, specifically found that the document filed by Petitioner Atwood entitled Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law did not constitute, either in form or substance, exceptions to the auditor's report. Judgment, therefore, was entered against Petitioner based on the Auditor's report.

In regard to the allegations raised by Petitioner concerning his "renewed" motion to disqualify Plaintiffs' counsel, Respondents note that this alleged "renewed" motion was the *only* motion to disqualify counsel filed by counsel for Petitioner and that said motion was only filed following the entry of judgment against Petitioner. Contrary to the allegations set forth by Petitioner Atwood, it is absolutely clear that the law firm of Bouhan, Williams & Levy has at all times, with the knowledge of all parties, represented Respondents Messrs. Sipple and Gibson and at no time has ever represented Mr. Atwood. The Affidavit of Alan S. Gaynor submitted by Respondents in their Brief in Opposition to Defendant Atwood's Renewed Motion to Disqualify Plaintiffs' Counsel establishes

that Charles H. Sipple has always been listed as the firm's client. At no time was Mr. Atwood ever listed in the internal accounting record of Bouhan, Williams & Levy as a client, nor has he ever received any statement for services rendered or paid any legal expenses in the law firm of Bouhan, Williams & Levy.

Petitioner Atwood's clear understanding of the representation by Bouhan, Williams & Levy of Messrs. Sipple and Gibson is evidenced by his sworn testimony in depositions taken during the course of this protracted litigation. For example, during the deposition of Mr. Atwood taken by John Stone of Bouhan, Williams & Levy on June 18, 1982, the following colloquy occurred:

> Q—With regard to the Memorandum of Agreement itself, where was that signed?
>
> A—I think it was signed in this building with the attorneys represented Mr. Gibson and Mr. Sipple. (This building being the offices of Bouhan, Williams & Levy.)
>
> Q—All right. Do you remember who drafted the Agreement?
>
> A—No.
>
> Q—Did you draft it?
>
> A—No, I did not. I think it was an attorney for Mr. Gibson and Mr. Sipple.
>
> Q—Did you have any attorney present?
>
> A—No.

(Deposition of James P. Atwood, pp. 24-25; R. 2223-24.)

Also, during the same deposition, Mr. Atwood explained a term of the Agreement as follows:

> A—That was the term put in there by Mr. Gibson and Mr. Sipple or attorneys representing them— . . . .

(Deposition of James P. Atwood, p. 70; R. 2225.)

Finally, at the continuation of the deposition of Mr. Atwood taken on November 17, 1982, again in response to questions by Mr. Stone, Mr. Atwood stated as follows:

> It was some very confused shades of gray because part of the automobiles had been in the initial arrangement when Mr. Gibson and Mr. Sipple had sat down, and I allowed them the latitude and freedom through their attorney as to their determination of setting the serial number proportion up.

(Deposition of James P. Atwood, p. 40; R. 2227.)

Thus, from the outset of this case, it is clear that Mr. Atwood was aware that the law firm of Bouhan, Williams & Levy was representing Mr. Sipple and Mr. Gibson, and in no way was he under the impression that he was being represented by that firm.

Moreover, it is also clear that no confidential information was elicited from Mr. Atwood by the law firm of Bouhan, Williams & Levy during discussions and meetings regarding the joint venture which is the subject matter of this litigation. As reflected in the Affidavit of Alan S. Gaynor which was attached as an exhibit to Respondents' Brief in Opposition to Defendant Atwood's Renewed Motion to Disqualify Plaintiffs' Counsel, at no time did Mr. Atwood and Mr. Gaynor meet without the presence of Mr. Sipple and Mr. Gibson. Thus, any information given to Mr. Gaynor by Mr. Atwood was available to all parties to the joint venture. In addition, all factual

and legal basis of the civil litigation in which the law firm of Bouhan, Williams & Levy is presently representing Mr. Sipple and Mr. Gibson arose subsequent to the execution of the joint venture agreement. Thus, Petitioner was in no way prejudiced by any information which he gave to Mr. Gaynor during discussions regarding the agreement.

———o———

VIII.

SUMMARY OF THE ARGUMENT

Respondents show that the Petitioner raises no substantial issues of federal law and that, therefore, this matter should not be heard by this Honorable Court. Petitioner's contentions concerning the disqualification of Respondents' counsel are absolutely without factual basis. Moreover, Petitioner failed to raise his contentions in a timely manner.

———o———

IX.

ARGUMENT

(A) Petitioner's appeal does not present a substantial federal question.

It is essential to jurisdiction of the Supreme Court under 28 U.S.C. 1257 that a substantial federal question was properly raised in the state court proceedings. An alleged federal question which is devoid of merit will not confer jurisdiction on this Honorable Court and the lack

of substantial federal question is sufficient cause for the dismissal of an appeal or for denial of the petition for writ of certiorari. *Zuchtv v. King,* 260 U.S. 174 (1922); *Palmer Oil Corp. v. Amerada Petroleum Corp.,* 343 U.S. 390 (1952). While the pleadings submitted by the Petitioner are not clear, it appears that the Petitioner in this matter wishes to obtain review, if at all, only through a petition for writ of certiorari. Respondents show that the contentions of the Petitioner must be dismissed for lack of a substantial federal question.

(B) Petitioner may not raise his contentions at this late date due to a procedural default.

At the outset, it must be recognized that not only are the Petitioner's arguments without foundation on the merits, but there has been a procedural default in this action. The Georgia Supreme Court will not pass upon Constitutional issues unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge. *Brunswick Peninsular Corporation v. Daugharty,* 203 Ga. 454, 456 (1948); *Brown v. State,* 114 Ga. 60 (1901); *Philyaw v. Fulton National Bank,* 139 Ga. App. 28 (1976). Petitioner in this action attempted to raise Constitutional issues for the first time in his Motion for Reconsideration of the Denial of the Writ of Certiorari to the Court of Appeals filed with the Supreme Court of Georgia. Those issues were never presented to the trial court, the Court of Appeals of Georgia or the Supreme Court of Georgia on Petitioner's original application for the writ of certiorari to the Georgia Court of Appeals. Thus, under Georgia law, any Constitutional issues were waived.

(C) The Georgia courts were absolutely correct in denying Petitioner's motion to disqualify counsel.

It must be recognized that under Georgia law, trial court rulings on orders of disqualification generally will not be disturbed on appeal. The question on review is whether there is any evidence to support the trial court's findings of fact. *Blumenfeld v. Borenstein*, 247 Ga. 406, 410 (1981); *Southern Shipping Co. v. Oceans International Corp.*, 174 Ga. App. 91, 94 (1985). In this regard, it is clear that the Petitioner's contentions are without factual basis. It must be emphasized that Petitioner filed his "Renewed Motion" on June 17, 1986 following the entry of judgment against him on that same day *without referring to one shred of sworn testimony, without attaching any affidavits and without making any citations to any matter of record with the trial court.* In response to Petitioner's own unsubstantiated motion, counsel for Respondents submitted the *sworn* affidavit of Alan S. Gaynor and excerpts of *sworn* testimony from the depositions of Petitioner James P. Atwood. This uncontroverted evidence fully supported the trial court's ruling.

Specifically, the Petitioner's "renewed" motion to disqualify Respondents' counsel was the *only* motion to disqualify counsel ever filed by counsel for Petitioner and that said motion was not filed until the very day of entry of judgment against Petitioner. Contrary to the allegations set forth by Petitioner Atwood, it is absolutely clear that the law firm of Bouhan, Williams & Levy has at all times throughout the litigation, with the knowledge of all parties, represented Respondents Messrs. Sipple and Gibson and at no time has ever represented Mr. Atwood. The unrebutted Affidavit of Alan S. Gaynor submitted by Re-

spondents as an attachment to their Brief in Opposition to Petitioner Atwood's "Renewed Motion to Disqualify Plaintiffs' Counsel" establishes that Charles H. Sipple has always been listed as the firm's client. At no time was Mr. Atwood ever listed in the internal accounting records of Bouhan, Williams & Levy as a client, nor has he ever received any statement for services rendered or paid any legal expenses in the law firm of Bouhan, Williams & Levy.

Petitioner Atwood's clear and unequivocal understanding of the representation by Bouhan, Williams & Levy only of Messrs. Sipple and Gibson is evidenced by his *sworn* testimony in depositions taken during the course of this protracted litigation, which testimony was also submitted as an attachment to Brief of Respondents in opposition to the motion to disqualify. As noted above, during the deposition of Mr. Atwood taken by John Stone of Bouhan, Williams & Levy on June 18, 1982, the following colloquy occurred:

> Q—With regard to the Memorandum of Agreement itself, where was that signed?
>
> A—I think it was signed in this building with *the attorneys representing Mr. Gibson and Mr. Sipple.* (This building being the offices of Bouhan, Williams & Levy.)
>
> Q—All right. Do you remember who drafted the Agreement?
>
> A—No
>
> Q—Did you draft it?
>
> A—*No, I did not. I think it was an attorney for Mr. Gibson and Mr. Sipple.*
>
> Q—*Did you have any attorney present?*
>
> A—*No.*

(Deposition of James P. Atwood, pp. 24-25; R. 2223-24) (emphasis supplied.)

Also, during the same deposition, Mr. Atwood explained a term of the Agreement as follows:

> A—*That was the term put in there by Mr. Gibson and Mr. Sipple or attorneys representing them*—. . . .

(Deposition of James P. Atwood, p. 70; R. 2225) (emphasis supplied.)

Finally, at the continuation of the deposition of Mr. Atwood taken on November 17, 1982, again in response to questions by Mr. Stone, Mr. Atwood stated as follows:

> It was some very confused shades of gray because part of the automobiles had been in the initial arrangement when Mr. Gibson and Mr. Sipple had sat down, and *I allowed them the latitude and freedom through their attorney as to their determination of setting the serial number proportion up.*

(Deposition of James P. Atwood, p. 40; R. 2227) (emphasis supplied.)

Thus, from the very outset of this case, it was clear that Mr. Atwood was aware that the law firm of Bouhan, Williams & Levy was representing Mr. Sipple and Mr. Gibson, and in no way was he under the impression that he was being represented by that firm. The trial court's

ruling based on the evidence presented was absolutely correct.

It further must be emphasized that the burden of proof on the Motion to Disqualify was on the Petitioner. *See Kirwan Brothers v. Butler,* 85 Ga. App. 846 (1952). It is well settled that the sort of unsupported conclusory allegations concerning Mr. Gaynor's alleged representation of Mr. Atwood are insufficient as a matter of law to carry Petitioner's burden of proof. *See Bolton Road Medical Center v. Citizens & Southern National Bank,* 151 Ga. App. 21 (1979). Again, no sworn testimony was ever presented to the trial court on the disqualification issue other than the affidavit of Alan Gaynor and deposition excerpts of Petitioner's own testimony establishing that Petitioner was fully aware that Alan Gaynor was not acting as his attorney. This evidence was attached to Respondents' response to Petitioner's motion for disqualification. Pettitioner James P. Atwood presented no sworn testimony whatsoever to attempt to controvert, if possible, as was his burden, his own prior sworn testimony or the testimony by sworn affidavit of Alan Gaynor. Thus, he not only totally failed to carry his burden of proof but also is conclusively bound by his prior sworn testimony. Under these circumstances, the trial court was entirely correct in its ruling on the disqualification issue and petitioner cannot possibly show any abuse of discretion.

Moreover, as recognized by the Georgia Court of Appeals, no attorney/client privilege could have attached to any meetings to discuss the venture involved in this case as between the venturers. *Walker v. Mason,* 75 Ga.

App. 229 (1947). As the court noted in *Gearhart v. Etheridge,* 232 Ga. 638, 640-41 (1974) citing *Professor Green's Treatise on the Georgia Law of Evidence:*

> If two or more persons jointly consult an attorney for the purpose of having him prepare a deed or contract for them, the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. ***In such situations it is considered that the attorney does not have an attorney-client relationship with either of the joint parties.*** (Emphasis supplied.)

The fact that Mr. Gaynor may have provided a service which benefited all of the joint venturers did not make Mr. Atwood his client or create a confidential relationship which would require the disqualification of Respondents' attorneys.

It further must be recognized that the trial court had ample discretion to deny Petitioner's motion on procedural grounds. Disqualification is an equitable proceeding vested in the sound discretion of the trial court. *Clifton v. State,* 187 Ga. 502, 505 (1939). Petitioner was guilty of inexcusable delay in asserting his last minute claim of disqualification made by motion filed on the same day that final judgment was entered after years of litigation. Petitioner only chose to pursue the issue of disqualification after a judgment had been rendered. Petitioner cannot sit on his alleged rights and then attempt to prevent the attorneys who have worked with the Respondents for many years from collecting on the judgment which they have secured on behalf of their clients. Undue prejudice would result to the Respondents if the Petitioner's Motion to Disqualify were to be granted at this late date. Under Georgia law, Petitioner Atwood's conduct clearly consti-

tutes laches. *Hornsby v. Rodriguez,* 116 Ga. 234 (1967); *Grant v. Fourth National Bank of Columbus,* 229 Ga. 855 (1972); *Citizens & Southern National Bank v. Ellis,* 171 Ga. 717 (1931); *see Lyle v. Superior Court,* 122 Cal. App. 3rd 468, 481, 175 Cal. Rptr. 918, 925 (1981). Ethical issues involving potential disqualification of counsel should be raised promptly by motion by the party asserting them at the earliest possible time after notice of said issues. *Jackson v. J. C. Penney,* 521 F. Supp. 1032, 1034, 1035 (N.D. Ga. 1981). A party may not delay in raising a disqualification issue in order to use it later as a tool to deprive an opponent of counsel of his choice after substantial preparation for a case has been completed. 521 F. Supp. at 1034-35.

Under the facts of this case, no issue of Constitutional dimension is raised by the Petitioner's dilatory effort to raise groundless charges against the Respondents' counsel.

———o———

CONCLUSION

WHEREFORE, Respondents respectfully request that the Petitioner's Petition for Writ of Certiorari be denied and that this case be dismissed without further proceedings.

Respectfully submitted,

ALAN S. GAYNOR
Attorney for Respondents
CHARLES SIPPLE, III and
JOEL GIBSON
BOUHAN, WILLIAMS & LEVY
Post Office Box 2139
Savannah, Georgia 31498-1001
(912) 236-2491

APPENDIX A

IN THE SUPERIOR COURT, EASTERN JUDICIAL CIRCUIT, GEORGIA

CHARLIE SIPPLE, III and JOE GIBSON,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 15535-C
ROBERTO, BAESSA, ALTAS NOMAS, S.A., UNION, S.A., and JAMES P. ATWOOD,	)	
Defendants	)	

ORDER

Defendant filed a Renewed Motion to Disqualify Plaintiffs' Counsel on June 17, 1986. Plaintiffs filed a brief in opposition to said motion on July 18, 1986.

After considering the motion and briefs filed by both parties,

IT IS ORDERED that said Renewed Motion to Disqualify Plaintiffs' Counsel be denied.

This 22nd day of July, 1986.

/s/ FRANK S. CHEATHAM
Frank S. Cheatham, Jr., Chief Judge
Superior Court, E.J.C., Ga.

cc: Mr. Joseph Bergen

Mr. Walter Hartridge

APPENDIX B

In the Court of Appeals of Georgia

73736. ATWOOD v. SIPPLE et al. (Bea-17)

(April 22, 1987)

BEASLEY, Judge.

Plaintiffs Sipple and Gibson sued Atwood and others for breach of contract, fraud, and conversion arising out of a joint venture agreement which basically provided that 119 saltwater damaged British Leyland automobiles were to be purchased from British Leyland and then shipped to Guatemala for sale. Because of the damage, the cars could not be sold in the United States. Atwood, a retired Army officer, was at that time living in Guatemala and claimed to be involved in the import/export business there. Although a substantial shipment was sent to Guatemala, for a myriad of reasons, the business was unsuccessful and the joint venture was terminated by plaintiffs in March 1980.

The complaint was filed in April 1980, naming only two Guatemalan companies and one individual, all of whom were involved in the Guatemalan end of the enterprise. In September 1981 after a default judgment was entered against the Guatemalan individual, the complaint was amended to add Atwood as a defendant. Two years later, plaintiffs and defendant Atwood consented to an order referring the matter to an auditor pursuant to Chapter 7 of Title 9, OCGA. The auditor heard the matter in June, 1984, and plaintiffs filed their 12-page "Proposed Findings of Fact and Conclusions of Law" on August 30. Defendant Atwood served but did not file his "Response to

Plaintiffs' Proposed Findings" on plaintiffs' counsel on October 27. Defendant did not submit any proposed findings of fact and conclusions of law. The auditor's 31-page report, finding for plaintiffs, was filed on September 23, 1985. Three days later, defendant filed the "Response to Plaintiffs' Proposed Findings" with the court.

After two months passed, defendant filed a "Motion to Withdraw Transcript for Duplication And to Allow Extension of Time to File Amendment to Exceptions with Memorandum." In this document, defendant contended that his Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law" . . . contained the substance of the exceptions this plaintiff has to the Report of the Auditor . . . ;" it was also indicated, in requesting the time extension, that defendant could not afford to purchase a copy of the transcript before the auditor's report was filed, and that thereafter ". . . counsel for this defendant became incapacitated by reason of a medical diagnosis that required . . . tests in hospitals . . . that continued through the week of November 18, 1985. . . ." Defendant's motion was denied on April 8, 1986.

Judgment was entered by the court for plaintiffs on June 17, 1986, the court holding that no timely exceptions had been filed by defendant to the auditor's report. From this judgment, defendant appeals.

1. Defendant contends, based on OCGA § 9-7-14 (c), that the trial court erred in not treating his Response to Plaintiffs' Proposed Findings of Facts and Conclusions of Law as the exceptions to the auditor's report. A review of the statutory scheme concerning auditor's reports, their use and purpose, however, dispels this argument.

Chapter 7 of Title 9, OCGA covers auditor's reports and the procedures involved in using an auditor. The parties agreed to submit the factual investigation to an auditor, and a lengthy hearing was conducted. The code then requires that ". . . the auditor shall file the evidence and a report in which he shall clearly and separately state all rulings made by him, classify and state his findings, and report his conclusions upon the law and facts." OCGA § 9-7-8. A party having objection of law or fact to the report of the auditor must file his exceptions to the report within "20 days after the report is filed and notice is given to the parties . . ." OCGA § 9-7-14 (a). While a trial judge may grant an extension of time for the filing of exceptions, any such application for an extension must be made before the initial 20 days expire. OCGA § 9-7-14 (b); *Collins v. Lyon, Lyon & Company, Inc.*, 222 Ga. 6 (1) (148 SE2d 428) (1966).

While defendant is correct that grounds for exceptions are no longer required to be complete in themselves, OCGA § 9-7-14 (c), he errs in his assertion that the liberal notice pleading concept of the Civil Practice Act overrides the specific requirements of the auditor's statute. See *Beck v. Cobb County*, 180 Ga. App. 808, 812 (350 SE2d 818) (1986); *Wise &c. Assoc. v. Rosser White &c. Inc.*, 146 Ga. App. 789, 794 (5c) (247 SE2d 479) (1978). Subsection (c), while not requiring the grounds for objection to be complete in themselves, goes on: "It shall be sufficient for purposes of this Code section, if the exceptions point out by title and paragraph number such part of the pleadings, and by page number such part of the auditor's report, and such parts of the evidence reported by the auditor as are necessary to an understanding of the errors

complained of." The reason for requiring such specificity in the factual exceptions is stated in OCGA § 9-7-17: "In all law cases where an auditor is appointed, exceptions of fact to his report shall be passed upon by the jury as in other issues of fact, . . ." The case is submitted to the jury on the testimony reported by the auditor, OCGA § 9-7-18, and the jury is required to find ". . . for or against each exception submitted seriatim." OCGA § 9-7-20.

The filing of a document which defendant "treated" as his exceptions is not sufficient for these purposes. *Beck v. Cobb County,* supra at 811, involved proceedings under the special statutory proceeding for condemnation, which is similar to the auditor statute. There, the condemnees raised issues concerning the county's power to take the property, but ". . . subsequent to the entry of the award of the special master and prior to the entry of the judgment of the trial court vesting title in the county pursuant to the special master's award, the only action taken by appellants was the filing of what can only be denominated a notice of appeal to a jury. . . . At no time did appellants file specific exceptions to the award of the special master in order to preserve their right to have the superior court pass upon their claims. . . ."

The Response filed by defendant likewise does not fulfill the purpose of the exceptions required by Chapter 7, and the trial court's failure to treat them as such was not error. It likewise follows that the court's denial of defendant's motion to amend this document was not error, because it did not perform the office of the requisite exceptions in the first place. It also follows that the denial of the motion to reconsider was not error, the initial de-

termination having been correct. There being no exceptions filed, the court did not err in entering judgment on the auditor's report in plaintiff's favor. OCGA § 9-7-21 (a).

2. Enumerations of Error 5-19 are all matters which should have been excepted to and, as discussed above, were not. Therefore, they were waived and will not now be considered. See *Foster v. Pennsylvania Millers Mut. Ins. Co.*, 143 Ga. App. 792 (240 SE2d 144) (1977).

3. After defendant was added to the suit in 1981, a change in counsel occurred and his present counsel entered the suit by appearance on March 29, 1983. No motion or other pleading was filed concerning the disqualification of plaintiffs' law firm prior to the hearing conducted by the auditor during June 1984.

About halfway through the hearing, defendant's counsel alluded to a perceived conflict in the context of objecting to the recovery of fees by plaintiffs' counsel since counsel had allegedly represented both plaintiffs and defendant in the drafting of the joint venture agreement at issue. The auditor ruled that such a matter had not been included in the order referring the dispute to him and advised defendant to file any such motion with the court. When the motion was filed in June 1986, it was based on the ground that the firm of plaintiffs' counsel had drafted the joint venture agreement (a lawyer other than trial counsel) and had obtained "privileged and confidential information" concerning the Guatemalan individual and defendant. Although there was conflict in the evidence as to whether the firm represented all three joint venturers or only the plaintiffs, it was not disputed that during all

meetings with the attorney doing the drafting, all three joint venturers were present.

Even if the law firm represented all three joint venturers as argued by defendant, the trial court's denial of the motion was not error. In a situation where joint venturers all meet with counsel at the same time for purposes of discussing their venture, the privilege does not apply as between the venturers. *Walker v. Mason,* 75 Ga. App. 229, 231 (1) (43 SE2d 116) (1947); Agnor's Ga. Evid., § 6-3; see *Gearhart v. Etheridge,* 232 Ga. 638, 640 (208 SE2d 460) (1974). *Healthcrest, Inc. v. American Medical International,* 605 FSupp 1507 (N.D. Ga. 1985), cited by defendant, does not dictate a different result. Aside from the fact that the case arose in a court whose rulings do not bind this Court, the ruling of the court was based on the specific finding that one of the drafting attorneys was a necessary witness for the client, a ground not raised in the present case.

Judgment affirmed. McMurray, P. J., and Sognier, J., concur.

APPENDIX C

COURT OF APPEALS
of the State of Georgia

Atlanta, May 8, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

73736. James P. Atwood v. Charles Sipple, III et al

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

May 8 1987

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written

/s/ Victoria McLaughlin

Clerk.

APPENDIX D

Clerk's Office, Supreme Court of Georgia

Atlanta Jun 4 1987

Case No. 44712. Atwood v. Sipple et al.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

APPENDIX E

Clerk's Office, Supreme Court of Georgia

Atlanta Jun 24 1987

The motion for a rehearing was denied today:

Case No. 44712. Atwood v. Sipple III et al.

Yours very truly,

JOLINE B. WILLIAMS, Clerk